

THE INDIVIDUALS WITH DISABILITIES  
EDUCATION IMPROVEMENT ACT

OF

2004

Overview, Explanation and Comparison

IDEA 2004

v.

IDEA 97

by

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# Table of Contents

Section (U.S.C. §)	Heading	Page #	
1400	Overview and Findings and Purposes	3	
	Findings	3	
	Purposes	6	
1401	Definitions	7	
	Child with a disability	7	
	Core Academic Subjects	7	
	Highly Qualified Special Ed Teachers	8	
1412	State Responsibilities	13	
	Child Find	13	
	LRE	13	
	Limitation on Private School Reimbursement	18	
	Participation in Assessments	21	
	Prohibition - Mandatory Meds	22	
1414	Evaluations and IEPs	23	
	Parental Consent for Evals	24	
	LD and Discrepancy Formula	27	
	Eval before change in Eligibility	28	
	IEPs	29	
	Definitions	29	
	In Effect at beginning of school year	32	
	Development of IEP	33	
	Review and Revision	34	
	Pilot Program Multi-Year IEP	36	
	1415	Procedural Safeguards	39
		Content of Prior Written Notice	41
		Due Process Complaint Notice	41
Procedural Safeguards Notice		42	
Mediation		44	
Due Process Hearing		45	
Resolution Session		45	
Appeal		48	
Attorney's Fees		49	
Maintenance of Current Placement (Stay-Put)		51	
Alternative Setting Placement (Discipline)		51	
Exhaustion required before other suits		55	
Age of Majority - Transfer of rights to student	56		

## 20 U.S.C. § 1400 FINDINGS AND PURPOSES

### Introduction

The Individuals with Disabilities Education Act of 1997 (IDEA 97) has been re-authorized and is now known as The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA 2004). We will refer to it as IDEA 2004.

Except for a few provisions, it will become effective on July 1, 2005.

In our books and training programs, we focus on five key statutes. The language of many of the key statutes has not changed. However there are some changes that you should know and understand. The key statutes are:

- Section 1400 - Finding and Purposes
- Section 1401 - Definitions
- Section 1412 - State Responsibilities (the “Catch All” statute)
- Section 1414 - Evaluations and IEPs
- Section 1415 - Procedural Safeguards (Rules of Procedure)

Each of these statutes has some important subsections (i.e., subsection (a), (b), (c)) and other subsections that have little significance.

This monograph contains the substantive changes to these five statutes by section and subsection. Text deleted from the IDEA 97 has been ~~struck through~~. Text that was added to the IDEA 2004 is *in italics*. In some cases, we describe or summarize changes to the law.

**Comment:** Summaries are in a different font.

**Wrightslaw: Special Education Law** includes the full text of the Individuals with Disabilities Education Act of 1997. **Wrightslaw: From Emotions to Advocacy** (FETA) includes the five key statutes. These articles include cross-references to **Wrightslaw: Special Education Law** and **Wrightslaw: From Emotions to Advocacy** (FETA) in a different font.

**Cross-Reference:** Findings are pages 19-24 in **Wrightslaw: Special Education Law**. Findings are pages 121-123 in **Wrightslaw: From Emotions to Advocacy** (FETA).

### 20 U.S.C. § 1400(c) Findings

**Comment:** “Findings” are the Congressional findings that led Congress to pass the law about educating children with disabilities. Findings are Section 1400(c)(1) through 1400(c)(14).

**Cross-Reference:** Findings and Purposes are pages 19-24 in **Wrightslaw: Special Education Law**. Findings and Purposes are pages 121-123 in **Wrightslaw: From Emotions to Advocacy** (FETA).

(1) unchanged

- (2) (A) through (E) include changes in sentence structure, grammar, and some content. Some subsections were merged. In subsection (C), references to “more than one half” and “1,000,000 of children” were deleted
- (3) unchanged
- (4) unchanged
- (5) Over ~~20~~ 30 years of research . . .
- (A) unchanged
- (B) strengthening the role *and responsibility* of . . .
- (C) coordinating this title with other local, educational service agency, State, and Federal school improvement efforts, *including improvement efforts under the Elementary and Secondary Education Act of 1965*, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;
- (D) unchanged
- (E) supporting high-quality, intensive *preservice preparation and* professional development for all personnel who work with children *with disabilities* in order to ensure that *such personnel* have the skills and knowledge necessary *to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;*
- (E)
- (i) and (ii) - deleted in entirety
- (F) providing incentives for whole-school approaches, *scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services* to reduce the need to label children as disabled in order to address *the learning and behavioral needs of such children;*
- (G) unchanged
- (H) *supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.*
- (6) While States, local educational agencies, and educational service agencies are ~~primarily~~ responsible . . .
- (7)
- (A) through (F) was completely deleted and replaced with:
- (7) *A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.*
- (8)
- (A) through (F) was completely deleted and replaced with:
- (8) *Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.*
- (9)
- (A) through (H) was completely deleted and replaced with:
- (9) *Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.*
- (10) was completely deleted and replaced with:
- (10)

*(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.*

*(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.*

*(C) Minority children comprise an increasing percentage of public school students.*

*(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.*

**Comment:** Four new subsections were added to 20 U.S.C. § 1400(c), beginning with 20 U.S.C. § 1400(c)(11) and ending with 20 U.S.C. § 1400(c)(14):

(11)

*(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.*

*(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.*

*(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.*

(12)

*(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.*

*(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.*

*(C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.*

*(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.*

*(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.*

(13)

*(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.*

*(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this title, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.*

*(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.*

## **20 U.S.C. § 1400(d) Purposes**

**Comment:** The “Purposes” section of IDEA is the most important statute in the law. The purpose is the mission statement. “Further education” and “system improvement” were the only additions to Purposes in IDEA 2004. Below are changes in 1400(d)(1) through 1400(d)(4).

**Cross-Reference:** Purposes is on page 24 of *Wrightslaw: Special Education Law* and on page 123 of *Wrightslaw: From Emotions to Advocacy* (FETA).

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for *further education*, employment, and independent living;

(B) unchanged

(C) unchanged

(2) unchanged

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting ~~systemic change~~ *system improvement* activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) unchanged

**End of 20 U.S.C. § 1400**

## 20 U.S.C. § 1401 DEFINITIONS

**Cross-Reference:** Definitions are pages 24 to page 31 in *Wrightslaw: Special Education Law*. Key Definitions are pages 125 to 127 in *Wrightslaw: From Emotions to Advocacy* (FETA).

### 20 U.S.C. § 1401 Definitions

*Except as otherwise provided, in this title:*

(1) ASSISTIVE TECHNOLOGY DEVICE -

**Comment:** Definition unchanged, but moved to subsection (A) and a new subsection (B) was added.

(A) IN GENERAL –

*(B) EXCEPTION - The term does not include a medical device that is surgically implanted, or the replacement of such device.*

(2) ASSISTIVE TECHNOLOGY SERVICE -

Subsections (A) through (F) were unchanged except the end of subsection (C) where the word “of” was deleted: or replacing of assistive technology devices;

(3) CHILD WITH A DISABILITY

(A) unchanged

(B) CHILD AGED 3 THROUGH 9 - The term ‘child with a disability’ for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child--

(i) and (ii) unchanged

*(4) CORE ACADEMIC SUBJECTS - The term ‘core academic subjects’ has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965.*

**Comment:** All definitions are in alphabetical order. The term “core academic subjects” is a new in IDEA and tracks the language of No Child Left Behind, i.e., the Elementary and Secondary Education Act of 1965 (ESEA). For more information about No Child Left Behind, see *Wrightslaw: No Child Left Behind (NCLB)*.

(5) EDUCATIONAL SERVICE AGENCY - unchanged, but moved from subsection (4) to subsection (5).

(6) ELEMENTARY SCHOOL - unchanged, but moved from subsection (5) to (6).

(7) EQUIPMENT - unchanged, but moved from subsection (6) to subsection (7).

(8) EXCESS COSTS - one reference to ESEA was changed to coincide with NCLB, otherwise unchanged, but moved from subsection (7) to subsection (8).

(9) FREE APPROPRIATE PUBLIC EDUCATION - unchanged, but moved from subsection (8) to (9).

**Comment:** The definitions of “highly qualified teachers” and “homeless children” are new and track the language of the No Child Left Behind Act of 2001.

*(10) HIGHLY QUALIFIED -*

*(A) IN GENERAL - For any special education teacher, the term `highly qualified' has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965, except that such term also--*

*(i) includes the requirements described in subparagraph (B); and*

*(ii) includes the option for teachers to meet the requirements of section 9101 of such Act by meeting the requirements of subparagraph (C) or (D).*

*(B) REQUIREMENTS FOR SPECIAL EDUCATION TEACHERS - When used with respect to any public elementary school or secondary school special education teacher teaching in a State, such term means that--*

*(i) the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the requirements set forth in the State's public charter school law;*

*(ii) the teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and*

*(iii) the teacher holds at least a bachelor's degree.*

*(C) SPECIAL EDUCATION TEACHERS TEACHING TO ALTERNATE ACHIEVEMENT STANDARDS - When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under the regulations promulgated under section 1111(b)(1) of the Elementary and Secondary Education Act of 1965, such term means the teacher, whether new or not new to the profession, may either--*

*(i) meet the applicable requirements of section 9101 of such Act for any elementary, middle, or secondary school teacher who is new or not new to the profession; or*

*(ii) meet the requirements of subparagraph (B) or (C) of section 9101(23) of such Act as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.*

*(D) SPECIAL EDUCATION TEACHERS TEACHING MULTIPLE SUBJECTS - When used with respect to a special education teacher who teaches 2 or more core academic subjects exclusively to children with disabilities, such term means that the teacher may either--*

*(i) meet the applicable requirements of section 9101 of the Elementary and Secondary Education Act of 1965 for any elementary, middle, or secondary school teacher who is new or not new to the profession;*

*(ii) in the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or*

*(iii) in the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects, not later than 2 years after the date of employment.*

*(E) RULE OF CONSTRUCTION - Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section or part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.*

*(F) DEFINITION FOR PURPOSES OF THE ESEA - A teacher who is highly qualified under this paragraph shall be considered highly qualified for purposes of the Elementary and Secondary Education Act of 1965.*

*(11) HOMELESS CHILDREN - The term 'homeless children' has the meaning given the term 'homeless children and youths' in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a).*

(12) INDIAN unchanged, but moved from subsection (9) to (12).

(13) INDIAN TRIBE - unchanged, but moved from subsection (10) to (13) and added a statutory reference at the end.

(14) - INDIVIDUALIZED EDUCATION PROGRAM - unchanged, but moved from subsection (11) to (14).

(15) INDIVIDUALIZED FAMILY SERVICE PLAN - unchanged, but moved from subsection (12) to (15).

(16) INFANT OR TODDLER WITH A DISABILITY - unchanged, but moved from subsection (13) to (16).

(17) INSTITUTION OF HIGHER EDUCATION - except for a statutory cross-reference, is unchanged, but moved from subsection (14) to (17).

**Comment:** The definition of "Limited English Proficient" in subsection 18 is new and tracks the language of the No Child Left Behind Act.

*(18) LIMITED ENGLISH PROFICIENT - The term 'limited English proficient' has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965.*

(19) LOCAL EDUCATIONAL AGENCY -

(moved from subsection (15) to (19))

(A) unchanged

(B) unchanged

(C) BIA FUNDED SCHOOLS - The term includes an elementary school or secondary school funded by the Bureau of Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency *receiving assistance under this title with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.*

(20) NATIVE LANGUAGE - (moved from subsection (16) to (20))

The term 'native language', when used with ~~reference~~ *respect* to an individual ~~or who is limited English proficient~~, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

(21) NONPROFIT - unchanged, but moved from subsection (17) to (21).

(22) OUTLYING AREA - unchanged, but moved from subsection (18) to (22).

(23) PARENT - significant changes, moved from subsection (19) to (23). The term 'parent' *means*

~~(A) includes a legal guardian; and~~

~~(B) except as used in sections 1415(b)(2) and 1439(a)(5), includes an individual assigned under either of those sections to be a surrogate parent.~~

*(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);*

*(B) a guardian (but not the State if the child is a ward of the State);*

*(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or*

*(D) except as used in sections 615(b)(2) (see 1415(b)(2)) and 639(a)(5) (see 1439(a)(5)), an individual assigned under either of those sections to be a surrogate parent.*

(24) PARENT ORGANIZATION - unchanged, but moved from subsection (20) to (24).

(25) PARENT TRAINING AND INFORMATION CENTER - unchanged, but moved from subsection (21) to (25).

(26) RELATED SERVICES -

**Comment:** In IDEA 97, the definition of related services was a single paragraph. Now, it is broken into two subparts, (A) and (B). Subpart (A) includes new language about interpreting

services and school nurse services. Subpart (B) creates an exception about surgically implanted devices, such as cochlear implants. Subsection 22 is now subsection 26.

(A) IN GENERAL - The term `related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, *interpreting services*, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, *school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child*, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) EXCEPTION - The term does not include a medical device that is surgically implanted, or the replacement of such device.

(27) SECONDARY SCHOOL - unchanged, but moved from subsection (23) to (27).

(28) SECRETARY - unchanged, but moved from subsection (24) to (28).

(29) SPECIAL EDUCATION - unchanged, but moved from subsection (25) to (29).

(30) SPECIFIC LEARNING DISABILITY - unchanged, but moved from (26) to (30).

**Comment:** The definition of “specific learning disability” is unchanged. However, Section 1414 (b)(6) IDEA 2004 states that schools “shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.”

(31) STATE - *The term `State' means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.*

**Comment:** This is new.

(32) STATE EDUCATIONAL AGENCY - unchanged, but moved from subsection (28) to (32).

(33) SUPPLEMENTARY AIDS AND SERVICES - unchanged, but moved from subsection (29) to (33).

(34) TRANSITION SERVICES - The term `transition services' means a coordinated set of activities for a child with a disability that--

(A) ~~are~~ ~~is~~ ~~designed~~ ~~within~~ ~~an~~ ~~outcome-oriented~~ ~~to~~ ~~be~~ ~~within~~ ~~a~~ ~~results-oriented~~ ~~process,~~ ~~that~~ ~~is~~ ~~focused~~ ~~on~~ ~~improving~~ ~~the~~ ~~academic~~ ~~and~~ ~~functional~~ ~~achievement~~ ~~of~~ ~~the~~ ~~child~~ ~~with~~ ~~a~~ ~~disability~~ ~~to~~ ~~facilitate~~ ~~the~~ ~~child's~~ ~~movement~~ ~~from~~ ~~school~~ ~~to~~ ~~post-school~~ ~~activities,~~ ~~including~~ ~~post-secondary~~ ~~education,~~ ~~vocational~~ ~~education,~~ ~~integrated~~ ~~employment~~ ~~(including~~ ~~supported~~ ~~employment),~~ ~~continuing~~ ~~and~~ ~~adult~~ ~~education,~~ ~~adult~~ ~~services,~~ ~~independent~~ ~~living,~~ ~~or~~ ~~community~~ ~~participation;~~

(B) ~~are~~ ~~based~~ ~~upon~~ ~~the~~ ~~individual~~ ~~students's~~ ~~needs,~~ ~~is~~ ~~based~~ ~~on~~ ~~the~~ ~~individual~~ ~~child's~~ ~~needs~~ ~~taking~~ ~~into~~ ~~account~~ ~~the~~ ~~child's~~ ~~strengths,~~ ~~preferences,~~ ~~and~~ ~~interests;~~ ~~and~~

(C) unchanged

**Comment:** The definitions of “Universal Design” and “Ward of the State are new in IDEA 2004.

*(35) UNIVERSAL DESIGN - The term `universal design' has the meaning given the term in section 3 of the Assistive Technology Act of 1998 (29 U.S.C. 3002).*

*(36) WARD OF THE STATE -*

*(A) IN GENERAL - The term `ward of the State' means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.*

*(B) EXCEPTION - The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23).*

**END OF 20 U.S.C. § 1401**

## 20 U.S.C. § 1412 STATE ELIGIBILITY

**Cross-Reference:** The State Eligibility / Catch All statute is in pages 44-58 in *Wrightslaw: Special Education Law* and pages 131-133 in *Wrightslaw: From Emotions to Advocacy* (FETA).

### 20 U.S.C. § 1412 State Eligibility

**Comments:** Section 1412 is about State Eligibility. In Wrightslaw training programs, we often refer to Section 1412 as the “Catchall” statute. In IDEA 97, Section 1412 included subparts (a) through (f). Subsection (a) had 22 subparts, numbered 1 through 22. In the reauthorized IDEA, subsection (a) has 25 subparts.

Subsections 17 through 23 relate to public participation and state public hearings, state funding rule of construction, maintenance of the State Advisory Panel, state records of suspension and expulsion rates and instructional materials, and are not included in this article. Subsections (b) through (f) of Section 1412 relate to funding matters and are not included in this article. The full text of Section 1412 of IDEA 2004 will be included in the second edition of *Wrightslaw: Special Education Law* and is also available online.

(a) IN GENERAL - A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions: *submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:*

#### (1) FREE APPROPRIATE PUBLIC EDUCATION

(A) IN GENERAL - unchanged

(B) LIMITATION - unchanged

(C) STATE FLEXIBILITY - *A State that provides early intervention services in accordance with part C to a child who is eligible for services under section 619, (see 1419) is not required to provide such child with a free appropriate public education.*

**Comment:** This is new.

#### (2) FULL EDUCATIONAL OPPORTUNITY GOAL - unchanged

#### (3) CHILD FIND

(A) IN GENERAL - All children with disabilities residing in the State, including children with disabilities *who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.*

(B) CONSTRUCTION - unchanged

#### (4) INDIVIDUALIZED EDUCATION PROGRAM - unchanged

#### (5) LEAST RESTRICTIVE ENVIRONMENT -

(A) IN GENERAL unchanged

(B) ADDITIONAL REQUIREMENT -

~~(i) IN GENERAL—If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism does not result in placements that violate the requirements of subparagraph (A).~~

*(i) IN GENERAL - A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.*

(ii) ASSURANCE - unchanged

(6) PROCEDURAL SAFEGUARDS -

(A) IN GENERAL - unchanged

(B) ADDITIONAL PROCEDURAL SAFEGUARDS - Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities *for services* under this title will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) EVALUATION - unchanged

(8) CONFIDENTIALITY - unchanged

(9) TRANSITION FROM PART C TO PRESCHOOL PROGRAMS - unchanged

(10) CHILDREN IN PRIVATE SCHOOLS -

**Comment:** Subsection (10) relating to unilateral private school placements by parents who seek reimbursement from school districts has been revised. The full text of this subsection is reproduced below.

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS -

(i) IN GENERAL - To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools *in the school district served by a local educational agency*, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (*including direct services to parentally placed private school children*) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

*(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.*

*(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.*

**Comment:** Subsection III (above) is new. The word “religious” schools replaced “parochial” schools. The following subsections are new.

*(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.*

*(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.*

(ii) CHILD FIND REQUIREMENT -

*(I) IN GENERAL - The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.*

*(II) EQUITABLE PARTICIPATION - The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.*

*(III) ACTIVITIES - In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.*

*(IV) COST - The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).*

*(V) COMPLETION PERIOD - Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.*

**Comment:** The language about (iii) Consultation with private school representatives (below) is new and brings IDEA into conformity with the language in NCLB. See **Wrightslaw: No Child Left Behind**.

*(iii) CONSULTATION - To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school*

*representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding--*

*(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;*

*(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;*

*(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;*

*(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and*

*(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.*

*(iv) WRITTEN AFFIRMATION - When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.*

*(v) COMPLIANCE -*

*(I) IN GENERAL - A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.*

*(II) PROCEDURE - If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary,*

*and the State educational agency shall forward the appropriate documentation to the Secretary.*

*(vi) PROVISION OF EQUITABLE SERVICES -*

*(I) DIRECTLY OR THROUGH CONTRACTS - The provision of services pursuant to this subparagraph shall be provided--*

*(aa) by employees of a public agency; or*

*(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.*

*(II) SECULAR, NEUTRAL, NONIDEOLOGICAL - Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.*

*(vii) PUBLIC CONTROL OF FUNDS - The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this title, and a public agency shall administer the funds and property.*

**(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES -**

**(i) IN GENERAL -** Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

**(ii) STANDARDS -** In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

**(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY -**

**(i) IN GENERAL -** Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

**(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT -** If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary *school* or secondary school without the consent of or referral by the public agency, a court or a hearing officer

may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) LIMITATION ON REIMBURSEMENT - The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(3), (see 1415(b)(3)) of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) EXCEPTION - Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--

(I) ~~may~~ *shall* not be reduced or denied for failure to provide such notice if--

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 615, (see 1415) of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) STATE EDUCATIONAL AGENCY RESPONSIBLE FOR GENERAL SUPERVISION -

(A) IN GENERAL - The State educational agency is responsible for ensuring that -

(i) unchanged

(ii) unchanged

(iii) *in carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.*

(B) LIMITATION - unchanged

(C) EXCEPTION - unchanged

(12) OBLIGATIONS RELATED TO AND METHODS OF ENSURING SERVICES - unchanged except for minor housekeeping in last line of Section 1412(a)(12)(B)(i) adding as follows: “. . . through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).”

(13) PROCEDURAL REQUIREMENTS RELATING TO LOCAL EDUCATIONAL AGENCY ELIGIBILITY - unchanged

~~(14) COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT—The State has in effect, consistent with the purposes of this Act and with section 1435(a)(8), a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of section 1453.~~

**Comment:** The language in (14) Personnel Qualifications (below) is new and brings IDEA into conformity with the language in NCLB. See ***Wrightslaw: No Child Left Behind***.

(14) PERSONNEL QUALIFICATIONS -

(A) *IN GENERAL* - *The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.*

(B) *RELATED SERVICES PERSONNEL AND PARAPROFESSIONALS* - *The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that--*

*(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;*

*(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and*

*(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services under this part to children with disabilities.*

(C) *QUALIFICATIONS FOR SPECIAL EDUCATION TEACHERS* - *The qualifications described in subparagraph (A) shall ensure that each person employed as a special education teacher in the*

*State who teaches elementary school, middle school, or secondary school is highly qualified by the deadline established in section 1119(a)(2) of the Elementary and Secondary Education Act of 1965.*

**Comment:** After this bill was published, the above subsection (C) was inserted as a technical amendment. This further brings IDEA into conformity with the language in NCLB. See **Wrightslaw: No Child Left Behind**.

*(D) POLICY - In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this part to children with disabilities.*

*(E) RULE OF CONSTRUCTION - Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this part.*

~~(15) PERSONNEL STANDARDS~~— Deleted. Replaced in part by the preceding section.

**Comment:** Subsection (15) about Performance Goals and Indicators (below) replaced subsection (16) in IDEA 97. Some language is the same.. The full text is below.

*(15) PERFORMANCE GOALS AND INDICATORS - The State--*

*(A) has established goals for the performance of children with disabilities in the State that--*

*(i) promote the purposes of this title, as stated in section 601(d);*

*(ii) are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965;*

*(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and*

*(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;*

*(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurable annual objectives for progress by children with disabilities under section 1111(b)(2)(C)(v)(II)(cc) of the Elementary and Secondary Education Act of 1965; and*

*(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 1111(h) of the Elementary and Secondary Education Act of 1965.*

**Comment:** Subsection (16) about Participation in Assessments (below) replaces subsection (17) in IDEA 97. Some language is the same; other portions have changed. The full text of subsection (16) is reproduced below.

*(16) PARTICIPATION IN ASSESSMENTS -*

*(A) IN GENERAL - All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.*

*(B) ACCOMMODATION GUIDELINES - The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.*

*(C) ALTERNATE ASSESSMENTS -*

*(i) IN GENERAL - The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.*

*(ii) REQUIREMENTS FOR ALTERNATE ASSESSMENTS - The guidelines under clause (i) shall provide for alternate assessments that--*

*(I) are aligned with the State's challenging academic content standards and challenging student academic achievement standards; and*

*(II) if the State has adopted alternate academic achievement standards permitted under the regulations promulgated to carry out section 1111(b)(1) of the Elementary and Secondary Education Act of 1965, measure the achievement of children with disabilities against those standards.*

*(iii) CONDUCT OF ALTERNATE ASSESSMENTS - The State conducts the alternate assessments described in this subparagraph.*

*(D) REPORTS - The State educational agency (or, in the case of a districtwide assessment, the local educational agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:*

*(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.*

*(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).*

*(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).*

*(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.*

*(E) UNIVERSAL DESIGN - The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any assessments under this paragraph.*

**Comment:** Subsections 17-23 relate to funding, public participation and state public hearings, state funding rule of construction, maintenance of the State Advisory Panel, record keeping of suspension and expulsion rates and instructional materials and are not included in this document. Subsections (b) through (f) of Section 1412 that relate to funding matters are not included in this article. The full text of Section 1412 and the Individuals with Disabilities Education Act of 2004 will be included in the second edition of ***Wrightslaw: Special Education Law*** and are available online at [www.wrightslaw.com](http://www.wrightslaw.com).

Section 1412 of IDEA 2004 includes two new subsections that will be of interest to parents and teachers. Subsection (24) about Overidentification and Disproportionality focuses on preventing schools from overidentifying children with disabilities by race and ethnicity. Subsection (25) prohibits school district personnel from requiring children from taking medication as a condition of attending school, being evaluated, or receiving special education services.

*(24) OVERIDENTIFICATION AND DISPROPORTIONALITY - The State has in effect, consistent with the purposes of this title and with section 618(d), (see 1418(d)) policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 602.*

*(25) PROHIBITION ON MANDATORY MEDICATION -*

*(A) IN GENERAL - The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 614, (see 1414(a)(c)) or receiving services under this title.*

*(B) RULE OF CONSTRUCTION - Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).*

**END OF 20 U.S.C. § 1412 State Eligibility**

## 20 U.S.C. § 1414 EVALUATIONS AND IEPs

**Cross-Reference:** Evaluations and IEPs are pages 59-66 in *Wrightslaw: Special Education Law* and pages 141-149 in *Wrightslaw: From Emotions to Advocacy* (FETA).

### 20 U.S.C. § 1414 Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

**Comment:** Section 1414 of the old and new IDEA contains subsections (a) through (f). The language of some subsections is unchanged although their location in Section 1414 may be different. Some portions of the statute have changed slightly, while other portions have been extensively revised. Because evaluations and IEPs are so important, the full text of Section 1414 of IDEA is included below.

#### (a) EVALUATIONS, PARENTAL CONSENT, AND REEVALUATIONS -

##### (1) INITIAL EVALUATIONS -

(A) IN GENERAL - A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this part.

(B) REQUEST FOR INITIAL EVALUATION - Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

~~(C) PARENTAL CONSENT (moved to (D) )~~

(C) PROCEDURES -

(i) IN GENERAL - Such initial evaluation shall consist of procedures--

(I) to determine whether a child is a child with a disability (as defined in section 602) (see definitions 1401) **within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and**

(II) to determine the educational needs of such child.

**Comment:** The determination of disability must be completed **within 60 days**, not within 60 business or school days, i.e., 2 months v. 3 months. This corrects a major deficiency in the statute. The time was never mandated in the federal law. Because of that omission, some states permitted as long as 65 school days, which led to extensive delays and denial of services. When the U. S. Code and Code of Federal Regulations create a timeline of days, the rule is calendar days, unless the specific statute or regulation clearly provides an alternative. Later regulations from the USDOE should determine if a school may adopt a timeline longer than 60 days.

(ii) EXCEPTION - The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if--

*(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 602), (see definitions 1401) but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or*

*(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.*

**(D) PARENTAL CONSENT -**

**(i) IN GENERAL -**

**(I) CONSENT FOR INITIAL EVALUATION -** The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 602 (1401) shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

*(II) CONSENT FOR SERVICES - An agency that is responsible for making a free appropriate public education available to a child with a disability under this part shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.*

**(ii) ABSENCE OF CONSENT -**

*(I) FOR INITIAL EVALUATION - If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 615, (see 1415) except to the extent inconsistent with State law relating to such parental consent.*

*(II) FOR SERVICES - If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 615 (see 1415).*

*(III) EFFECT ON AGENCY OBLIGATIONS - If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent--*

*(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and*

*(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.*

*(iii) CONSENT FOR WARDS OF THE STATE -*

*(I) IN GENERAL - If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 602) (see 1401) of the child for an initial evaluation to determine whether the child is a child with a disability.*

*(II) EXCEPTION - The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if--*

*(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;*

*(bb) the rights of the parents of the child have been terminated in accordance with State law; or*

*(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.*

*(E) RULE OF CONSTRUCTION - The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.*

*(2) REEVALUATIONS -*

*(A) IN GENERAL - A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)--*

*(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or*

*(ii) if the child's parents or teacher requests a reevaluation.*

*(B) LIMITATION - A reevaluation conducted under subparagraph (A) shall occur--*

*(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and*

**Comment:** In some circumstances, if a child has been reevaluated, a placement change has been proposed by the school district and parent objects and requests a due process hearing, the school district often insists on new evaluations in preparation for litigation. The preceding subsection may limit those instances.

*(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.*

**(b) EVALUATION PROCEDURES -**

(1) NOTICE - The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 615, (1415) that describes any evaluation procedures such agency proposes to conduct.

(2) CONDUCT OF EVALUATION - In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single ~~procedure~~ *measure or assessment* as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) ADDITIONAL REQUIREMENTS - Each local educational agency shall ensure that--

(A) ~~tests~~ assessments and other evaluation materials used to assess a child under this section--

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the ~~child's native language or other mode of communication~~ *language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;*

(iii) *are used for purposes for which the assessments or measures are valid and reliable;*

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such ~~tests~~ assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

*(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.*

(4) DETERMINATION OF ELIGIBILITY AND EDUCATIONAL NEED - Upon completion of the administration of assessments and other evaluation measures--

(A) the determination of whether the child is a child with a disability as defined in section 602(3) (1401(3)) *and the educational needs of the child* shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility ~~will~~ *shall* be given to the parent.

(5) SPECIAL RULE FOR ELIGIBILITY DETERMINATION - In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is--

*(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 1208(3) of the Elementary and Secondary Education Act of 1965);*

*(B) lack of instruction in math; or*

*(C) limited English proficiency.*

(6) SPECIFIC LEARNING DISABILITIES -

**COMMENT:** The statute about eligibility of children with specific learning disabilities changed. Schools are not required to use a severe discrepancy between achievement and intellectual ability to find that a child has a specific learning disability and requires special education services.

*(A) IN GENERAL - Notwithstanding section 607(b), when determining whether a child has a specific learning disability as defined in section 602, (see definitions, Section 1401) a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.*

*(B) ADDITIONAL AUTHORITY - In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).*

(c) ADDITIONAL REQUIREMENTS FOR EVALUATION AND REEVALUATIONS -

(1) REVIEW OF EXISTING EVALUATION DATA - As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall--

(A) review existing evaluation data on the child, including--

- (i) evaluations and information provided by the parents of the child;
- (ii) current classroom-based, *local*, or *State* assessments, and *classroom-based* observations; and
- (iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--

- (i) ~~whether the child has a particular category of disability, as described in section 1401(3) whether the child is a child with a disability as defined in section 602(3), (see definitions, section 1401(3)) and the educational needs of the child,~~ or, in case of a reevaluation of a child, whether the child continues to have such a disability *and such educational needs*;
- (ii) the present levels of ~~performance and educational~~ *academic* achievement and *related developmental* needs of the child;
- (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

(2) SOURCE OF DATA - The local educational agency shall administer such ~~tests~~ assessments and other evaluation ~~materials~~ measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) PARENTAL CONSENT - Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) REQUIREMENTS IF ADDITIONAL DATA ARE NOT NEEDED - If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency--

(A) shall notify the child's parents of--

- (i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and *to determine the child's educational needs*; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

**(5) EVALUATIONS BEFORE CHANGE IN ELIGIBILITY -**

(A) **IN GENERAL** - *Except as provided in subparagraph (B)*, a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) **EXCEPTION** -

(i) **IN GENERAL** - *The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.*

(ii) **SUMMARY OF PERFORMANCE** - *For a child whose eligibility under this part terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.*

**(d) INDIVIDUALIZED EDUCATION PROGRAMS -**

(1) **DEFINITIONS** - In this title:

(A) **INDIVIDUALIZED EDUCATION PROGRAM** -

(i) **IN GENERAL** - The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(I) a statement of the child's present levels of ~~educational performance~~ *academic achievement and functional performance*, including--

(aa) how the child's disability affects the child's involvement and progress in the general *education* curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) *for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;*

(II) a statement of measurable annual goals, ~~including benchmarks or short-term objectives, related to~~ *including academic and functional goals, designed to--*

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and *make* progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

*(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;*

(IV) a statement of the special education and related services and supplementary aids and services, based on *peer-reviewed research to the extent practicable*, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

**Comment:** The services are to be based on peer-reviewed research, i.e., which method has stood the test of research. Anecdotal claims of success and beliefs about a program are insufficient. In litigation, a school district's reliance upon an "eclectic approach" will become the kiss of death for that district. Assertions that the district takes "the best parts of the best" methods and modifies them to a particular child will become less frequent. One Court, in commenting on such testimony and ruling for a child, said that the school district obviously had no expertise in any research based method.

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and *make* progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

*(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16)(A); and*

*(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why--*

*(AA) the child cannot participate in the regular assessment; and*

*(BB) the particular alternate assessment selected is appropriate for the child;*

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) *beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter--*

*(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;*

*(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and*

*(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this title, if any, that will transfer to the child on reaching the age of majority under section 615(m) (see 1415(m)).*

*(ii) RULE OF CONSTRUCTION - Nothing in this section shall be construed to require--*

*(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and*

*(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.*

**Comment:** In IDEA 97, this was included at the end of the IEP statute. Like many preceding subsections, this was moved in IDEA 2004.

(B) INDIVIDUALIZED EDUCATION PROGRAM TEAM - The term 'individualized education program team' or 'IEP Team' means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) ~~at least one~~ *not less than 1* regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) ~~at least one~~ *not less than 1* special education teacher, or where appropriate, ~~at least one~~ *not less than 1* special education provider of such child;

(iv) a representative of the local educational agency who--

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

**(C) IEP TEAM ATTENDANCE -**

*(i) ATTENDANCE NOT NECESSARY - A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.*

*(ii) EXCUSAL - A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--*

*(I) the parent and the local educational agency consent to the excusal; and*

*(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.*

*(iii) WRITTEN AGREEMENT AND CONSENT REQUIRED - A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.*

**(D) IEP TEAM TRANSITION -** *In the case of a child who was previously served under part C, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the part C service coordinator or other representatives of the part C system to assist with the smooth transition of services.*

**(2) REQUIREMENT THAT PROGRAM BE IN EFFECT -**

**(A) IN GENERAL -** At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

**(B) PROGRAM FOR CHILD AGED 3 THROUGH 5 -** In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), *the IEP Team shall consider the individualized family service plan that contains the material described in section 636, (see 1436) and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is--*

*(i) consistent with State policy; and*

*(ii) agreed to by the agency and the child's parents.*

(C) PROGRAM FOR CHILDREN WHO TRANSFER SCHOOL DISTRICTS -

(i) IN GENERAL -

*(I) TRANSFER WITHIN THE SAME STATE - In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.*

*(II) TRANSFER OUTSIDE STATE - In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.*

(ii) TRANSMITTAL OF RECORDS - To facilitate the transition for a child described in clause (i)--

*(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and*

*(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.*

(3) DEVELOPMENT OF IEP -

(A) IN GENERAL - In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider--

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) *the academic, developmental, and functional needs of the child.*

(B) CONSIDERATION OF SPECIAL FACTORS - The IEP Team shall--

(i) in the case of a child whose behavior impedes ~~his or her learning~~ *the child's learning* or that of others, consider, ~~when appropriate~~, the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) **REQUIREMENT WITH RESPECT TO REGULAR EDUCATION TEACHER** - A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions, *supports, and other* strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) **AGREEMENT** - *In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.*

(E) **CONSOLIDATION OF IEP TEAM MEETINGS** - *To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.*

(F) **AMENDMENTS** - *Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.*

#### (4) REVIEW AND REVISION OF IEP -

(A) **IN GENERAL** - The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--

(i) reviews the child's IEP periodically, but not less *frequently* than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

- (I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
- (II) the results of any reevaluation conducted under this section;
- (III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);
- (IV) the child's anticipated needs; or
- (V) other matters.

(B) REQUIREMENT WITH RESPECT TO REGULAR EDUCATION TEACHER - A regular education teacher of the child, as a member of the IEP Team, shall, ~~to the extent appropriate,~~ consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) MULTI-YEAR IEP DEMONSTRATION -

(A) PILOT PROGRAM -

(i) PURPOSE - *The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.*

(ii) AUTHORIZATION - *In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).*

(iii) PROPOSAL -

(I) IN GENERAL - *A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.*

(II) CONTENT - *The proposal shall include--*

(aa) *assurances that the development of a multi-year IEP under this paragraph is optional for parents;*

(bb) *assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;*

(cc) *a list of required elements for each multi-year IEP, including--*

(AA) *measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and*

*(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and*

*(dd) a description of the process for the review and revision of each multi-year IEP, including--*

*(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;*

*(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;*

*(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and*

*(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.*

*(B) REPORT - Beginning 2 years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including--*

*(i) reducing--*

*(I) the paperwork burden on teachers, principals, administrators, and related service providers; and*

*(II) noninstructional time spent by teachers in complying with this part;*

*(ii) enhancing longer-term educational planning;*

*(iii) improving positive outcomes for children with disabilities;*

*(iv) promoting collaboration between IEP Team members; and*

*(v) ensuring satisfaction of family members.*

*(C) DEFINITION - In this paragraph, the term 'natural transition points' means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.*

(6) FAILURE TO MEET TRANSITION OBJECTIVES - If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out ~~in that program~~ in the IEP.

(7) CHILDREN WITH DISABILITIES IN ADULT PRISONS -

(A) IN GENERAL - The following requirements ~~do~~ shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

- (i) The requirements contained in section 612(a)(16) (see 1412(a)(16)) and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).
- (ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this part will end, because of such children's age, before such children will be released from prison.

(B) ADDITIONAL REQUIREMENT - If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 612(a)(5)(A) and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) EDUCATIONAL PLACEMENTS - Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

*(f) ALTERNATIVE MEANS OF MEETING PARTICIPATION - When conducting IEP team meetings and placement meetings pursuant to this section, section 615(e), and section 615(f)(1)(B), (see 1415(e) and (f)(1)(B)) and carrying out administrative matters under section 615 (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.*

**End of 20 U.S.C. § 1414**

This page intentionally left blank for your notes about evaluations, IEPs, and procedural safeguards.

## 20 U.S.C. § 1415 PROCEDURAL SAFEGUARDS

### Introduction

**Cross-Reference:** The Procedural Safeguards / Rules of Procedure statute is in pages 67-80 in *Wrightslaw: Special Education Law* and in pages 154-173 in *Wrightslaw: From Emotions to Advocacy* (FETA).

### 20 U.S.C. § 1415 Procedural Safeguards

**Comment:** Section 1415 of the new IDEA contains subsections (a) through (o). The language of some subsections remained the same while there have been sweeping changes in other provisions. Subsections (n) and (o) were added at the end of Section 1415. Because Procedural Safeguards, i.e., Rules of Procedure are so important, the full text of Section 1415 is included in this article.

(a) ESTABLISHMENT OF PROCEDURES - Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) TYPES OF PROCEDURES - The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)

(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, ~~including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;~~ *including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of--*

*(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and*

*(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.*

*(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.*

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency--

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

**Comment:** Subsection (6) (below) was split into two subsections, (A) and (B). IDEA 2004 includes a new two-year statute of limitations. IDEA did not contain a statute of limitations until now.

(6) An opportunity for any party to present a complaint--

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

*(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.*

~~(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)~~

(7)

*(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)--*

*(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and*

*(ii) that shall include--*

*(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;*

*(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;*

*(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and*

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

*(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).*

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

*(c) NOTIFICATION REQUIREMENTS -*

(1) CONTENT OF PRIOR WRITTEN NOTICE - The notice required by subsection (b)(3) shall include--

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

**Comment:** The preceding section (1) about Prior Written Notice includes the original elements in IDEA 97, but in a different sequence and structure. Section (2) about Due Process Complaint Notice (below) creates a new procedural requirement that may narrow down issues or may lead to more settlements, after the issue and facts leading to the complaint are clarified.

*(2) DUE PROCESS COMPLAINT NOTICE -*

*(A) COMPLAINT - The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).*

*(B) RESPONSE TO COMPLAINT -*

*(i) LOCAL EDUCATIONAL AGENCY RESPONSE -*

*(1) IN GENERAL - If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint*

*notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include--*

*(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;*

*(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;*

*(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and*

*(dd) a description of the factors that are relevant to the agency's proposal or refusal.*

*(II) SUFFICIENCY - A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.*

*(ii) OTHER PARTY RESPONSE - Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.*

*(C) TIMING - The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.*

*(D) DETERMINATION - Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.*

*(E) AMENDED COMPLAINT NOTICE -*

*(i) IN GENERAL - A party may amend its due process complaint notice only if--*

*(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or*

*(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.*

*(ii) APPLICABLE TIMELINE - The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).*

*(d) PROCEDURAL SAFEGUARDS NOTICE -*

~~*(1) IN GENERAL - A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum-*~~

*(1) IN GENERAL -*

(A) COPY TO PARENTS - A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents *only 1 time a year, except that a copy also shall be given to the parents--*

- (i) upon initial referral or parental request for evaluation;
- (ii) upon *the first occurrence of the filing of a complaint* under subsection (b)(6); and
- (iii) upon request by a parent.

~~(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and~~

*(B) INTERNET WEBSITE - A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.*

(2) CONTENTS - The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

- (A) independent educational evaluation;
- (B) prior written notice;
- (C) parental consent;
- (D) access to educational records;
- (E) the opportunity to present and resolve complaints, including--
  - (i) the time period in which to make a complaint;*
  - (ii) the opportunity for the agency to resolve the complaint; and*
  - (iii) the availability of mediation;*
- (F) the child's placement during pendency of due process proceedings;
- (G) procedures for students who are subject to placement in an interim alternative educational setting;
- (H) requirements for unilateral placement by parents of children in private schools at public expense;
- ~~(I) mediation;~~

**Comment:** Since (I) Mediation was moved to subsection (G)(iii) above, the subsequent subsections were renumbered and end at (L), not (M).

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) MEDIATION -

(1) IN GENERAL - Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process. ~~which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).~~

(2) REQUIREMENTS - Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process--

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY - A local educational agency or a State agency may establish procedures ~~to require parents who~~ *to offer to parents and schools that* choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with--

(i) a parent training and information center or community parent resource center in the State established under section 671 or 672; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS - The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) COSTS - The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION - Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

~~(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.~~

~~(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.~~

*(F) WRITTEN AGREEMENT - In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that--*

*(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;*

*(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and*

*(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.*

*(G) MEDIATION DISCUSSIONS - Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.*

(f) IMPARTIAL DUE PROCESS HEARING -

(1) IN GENERAL -

(A) HEARING - Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

**Comment:** Subsection (B) about a Resolution Session (below) is new and is designed to encourage settlements prior to the evidentiary phase of a due process hearing. It appears that a request for a due process hearing must have been received pursuant to 20 U.S.C. 1415(b)(6) or the discipline procedures under subsection (k). The complaint must comply with the Notice and description requirements under 1415(c)(2).)

(B) RESOLUTION SESSION -

*(i) PRELIMINARY MEETING - Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint--*

*(I) within 15 days of receiving notice of the parents' complaint;*

*(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;*

*(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and*

*(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).*

*(ii) HEARING - If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.*

*(iii) WRITTEN SETTLEMENT AGREEMENT - In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is--*

*(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and*

*(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.*

*(iv) REVIEW PERIOD - If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.*

## **(2) DISCLOSURE OF EVALUATIONS AND RECOMMENDATIONS -**

**(A) IN GENERAL -** ~~At least~~ *Not less than* 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

**(B) FAILURE TO DISCLOSE -** A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

~~(3) LIMITATION ON CONDUCT OF HEARING - A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.~~

## **(3) LIMITATIONS ON HEARING -**

**(A) PERSON CONDUCTING HEARING -** *A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum--*

*(i) not be--*

*(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or*

*(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;*

*(ii) possess knowledge of, and the ability to understand, the provisions of this title, Federal and State regulations pertaining to this title, and legal interpretations of this title by Federal and State courts;*

*(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and*

*(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.*

*(B) SUBJECT MATTER OF HEARING - The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.*

*(C) TIMELINE FOR REQUESTING HEARING - A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.*

*(D) EXCEPTIONS TO THE TIMELINE - The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--*

*(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or*

*(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.*

*(E) DECISION OF HEARING OFFICER -*

*(i) IN GENERAL - Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.*

*(ii) PROCEDURAL ISSUES - In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--*

*(I) impeded the child's right to a free appropriate public education;*

*(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or*

*(III) caused a deprivation of educational benefits.*

*(iii) RULE OF CONSTRUCTION - Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.*

*(F) RULE OF CONSTRUCTION - Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.*

(g) APPEAL -

(1) IN GENERAL - If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) IMPARTIAL REVIEW AND INDEPENDENT DECISION - The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

**Comment:** The preceding subsection was divided into two subparts but the language remains the same.

(h) SAFEGUARDS - Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions--

(A) shall be made available to the public consistent with the requirements of section 617(b) (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21).

(i) ADMINISTRATIVE PROCEDURES -

(1) IN GENERAL -

(A) DECISION MADE IN HEARING - A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) DECISION MADE AT APPEAL - A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) RIGHT TO BRING CIVIL ACTION -

(A) IN GENERAL - Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

*(B) LIMITATION - The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.*

**Comment:** Subsection (B) about Limitation is new. Former subsection (B) is now (C). Subsection (B) creates a new statute of limitations in which the losing party has 90 days to appeal to state or federal court.

(C) ADDITIONAL REQUIREMENTS - In any action brought under this paragraph, the court--

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES -

(A) IN GENERAL - The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

**Comment:** Subsection (B) on Award of Attorneys' Fees (below) is new. This subsection permits school districts to recover attorneys' fees from the parent and the attorney of a parent who files a frivolous complaint or litigates for an improper purpose, such as to harass, to cause unnecessary delay, or needlessly increase the cost of litigation.

*(B) AWARD OF ATTORNEYS' FEES -*

*(i) IN GENERAL - In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--*

*(I) to a prevailing party who is the parent of a child with a disability;*

*(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or*

*(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.*

*(ii) RULE OF CONSTRUCTION - Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.*

(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES - Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES -

(i) IN GENERAL - Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP TEAM MEETINGS - Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

*(iii) OPPORTUNITY TO RESOLVE COMPLAINTS - A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered--*

*(I) a meeting convened as a result of an administrative hearing or judicial action; or*

*(II) an administrative hearing or judicial action for purposes of this paragraph.*

(E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS - Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES - Except as provided in subparagraph (G), whenever the court finds that--

(i) the parent, *or the parent's attorney*, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the ~~school district~~ *local educational agency* the appropriate information in the ~~due process complaint~~ *notice of the complaint* described in subsection (b)(7)(A), the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES - The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT - Except as provided in subsection ~~(k)(7)~~, (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

**Comment:** Subsection (j) about Maintenance of Current Educational Placement (above) is also known as the "Stay-Put" statute. This statute is essentially unchanged.

(k) PLACEMENT IN ALTERNATIVE EDUCATIONAL SETTING -

**Comment:** Section (k) is the discipline statute. In IDEA 97, the language, sentence structure, and location of key subsections was difficult to read and follow. In IDEA 2004, most of the language remains the same but subsections have been moved to more logical locations so the statute is easier to read and understand. To permit ease of reading, many deletions from the old statute are not noted ~~with the usual line through / cross-out~~ as is the case in other portions of section 1415.

(1) AUTHORITY OF SCHOOL PERSONNEL -

*(A) CASE-BY-CASE DETERMINATION - School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.*

*(B) AUTHORITY - School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).*

*(C) ADDITIONAL AUTHORITY - If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the*

*child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) (**Comment:** see 1412(a)(1) that requires that FAPE continue for suspended or expelled student) although it may be provided in an interim alternative educational setting.*

*(D) SERVICES - A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall--*

*(i) continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and*

*(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.*

*(E) MANIFESTATION DETERMINATION -*

*(i) IN GENERAL - Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--*

*(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or*

*(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.*

*(ii) MANIFESTATION - If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.*

*(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION - If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--*

*(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);*

*(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and*

(iii) *except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.*

**(G) SPECIAL CIRCUMSTANCES** - *School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--*

*(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;*

*(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or*

*(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.*

**(H) NOTIFICATION** - *Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.*

**(2) DETERMINATION OF SETTING** - *The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.*

**(3) APPEAL** -

**(A) IN GENERAL** - *The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.*

**(B) AUTHORITY OF HEARING OFFICER** -

*(i) IN GENERAL* - *A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).*

*(ii) CHANGE OF PLACEMENT ORDER* - *In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may--*

*(I) return a child with a disability to the placement from which the child was removed; or*

*(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.*

**(4) PLACEMENT DURING APPEALS** - *When an appeal under paragraph (3) has been requested by either the parent or the local educational agency--*

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

*(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.*

**(5) PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES -**

(A) **IN GENERAL** - A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates ~~any rule or code of conduct~~ *a code of student conduct*, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) **BASIS OF KNOWLEDGE** - A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred--

(i) the parent of the child has expressed concern in writing *to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child*, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B); (see section 1414 - evaluations) or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed *specific concerns about a pattern of behavior demonstrated by the child, directly* to the director of special education of such agency or to other *supervisory* personnel of the agency.

~~(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.~~

(C) **EXCEPTION** - *A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 (see 1414) or has refused services under this part or the child has been evaluated and it was determined that the child was not a child with a disability under this part.*

**(D) CONDITIONS THAT APPLY IF NO BASIS OF KNOWLEDGE -**

(i) **IN GENERAL** - If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures

applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) **LIMITATIONS** - If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this part, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) **REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES**

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(A) **RULE OF CONSTRUCTION** - Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) **TRANSMITTAL OF RECORDS** - An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) **DEFINITIONS** - In this subsection:

(A) **CONTROLLED SUBSTANCE** - The term 'controlled substance' means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) **ILLEGAL DRUG** - The term 'illegal drug' means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

~~(C) **SUBSTANTIAL EVIDENCE** - The term 'substantial evidence' means beyond a preponderance of the evidence.~~

(C) **WEAPON** - The term 'weapon' has the meaning given the term 'dangerous weapon' under section 930(g)(2) of title 18, United States Code.

(D) **SERIOUS BODILY INJURY** - *The term 'serious bodily injury' has the meaning given the term 'serious bodily injury' under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.*

(I) **RULE OF CONSTRUCTION** - Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also

available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.

(m) TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY -

(1) IN GENERAL - A State that receives amounts from a grant under this part may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)--

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) SPECIAL RULE - If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part.

*(n) ELECTRONIC MAIL - A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.*

*(o) SEPARATE COMPLAINT - Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.*

**Comment:** The two sections (above) about Electronic Mail and Separate Complaint are new in IDEA 2004.

**End of 20 U.S.C. § 1415**

Note: The U.S. Department of Education will prepare regulations for IDEA 2004. After the regulations are issued, our book, *Wrightslaw: Special Education Law*, will be re-issued, as a second edition with the new statute (United State Code) and new regulations. After IDEA 97 was revised, issuance of the regulations was delayed for almost two years.